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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

Application on Behalf of JOSEPH EMMET GROSS, For Writ Of Habeas Corpus.	No. (Undocketed) Supreme Court of the State of California No. 12769

JURISDICTIONAL STATEMENT

(Rule 13(2) and 15)
Rules Of The United States Supreme Court

(a) This is an appeal taken from the order of the Supreme Court of the State of California, dated November 13, 1968, denying the Petition for Writ of Habeas Corpus that had been filed on behalf of appellant JOSEPH EMMET GROSS. This appeal has its origin in an appeal from an intermediate order made by the Municipal Court of the State of California for the County of Los Angeles denying a motion to suppress evidence and traversing a search warrant as permitted by the laws of the State of California.[1]

1 For the purpose of 28 U.S.C. 1257(2), the Appellate Department of the Superior Court of the State of California is the "highest court of the state"

The California Supreme Court denied the Petition for Writ of Habeas Corpus without hearing or opinion. The "Memorandum Opinion and Judgment" of the Appellate Department of the Superior Court for the County of Los Angeles (No. CR A 8007), attached hereto as "Appendix A," is not officially reported. The record of proceedings in the Municipal Court and a certified record of the proceedings in the Appellate Department of the Superior Court was prepared by the Clerk of the Appellate Department of the Superior Court to transmit to this Court pursuant to the original Notice of Appeal. It can be re-sent to this Court if the Court desires.

(b) The jurisdiction of this Court is invoked on the grounds, *interalia,* that both the Supreme Court of the State of California and the Appellate Department of the Superior Court of the State of California for the County of Los Angeles upheld California Penal Code section 1524(3) against a claim of unconstitutionality under the federal Constitution. Other questions raised also invoke federal constitutional questions and invoke the jurisdiction of this Court (see *infra*):

(i) Defendant and appellant JOSEPH EMMET GROSS was charged in a complaint filed in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, with two counts of violating California Penal Code section 311.2 (exhibiting or distributing obscene matter). On December 11, 1967, appellant Gross

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1 Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 19. However, although a Notice of Appeal was filed from the order of the Appellate Department of the Superior Court, it was decided that the better remedy would be to proceed by way of habeas corpus to the California Supreme Court, since this was an "intermediate" appeal and no judgment of conviction had been entered in the Municipal Court which was finally affirmed in the Appellate Department of the Superior Court.

brought on for hearing a Motion to Suppress Evidence and to Quash Search Warrant pursuant to the provisions of California Penal Code section 1538.5. These motions were denied. Pursuant to Penal Code section 1538.5, an appeal was taken to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. On July 31, 1968, the Appellate Department affirmed the order denying the Motion to Suppress and Return Evidence, and on August 13, 1968, the Appellate Department denied a Petition for Rehearing and a Petition for Certification to the Court of Appeal. On or about October 12, 1968, petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court, challenging the propriety of the ruling below. Additionally, on November 4, 1968, appellant filed a Notice of Appeal to this Court from the Order Denying Rehearing and Denying Certification.

(ii) The Petition for Writ of Habeas Corpus was denied by the California Supreme Court on November 13, 1968; the Notice of Appeal from the denial of Petition for Writ of Habeas Corpus was filed in the Supreme Court of the State of California on January 10, 1969. On August 13, 1968, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles denied a Petition for Rehearing and a Petition for Certification to the Court of Appeal; on November 4, 1968, a Notice of Appeal to this Court was filed in the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Code, section 1257(2).

(iv) For case authority conferring jurisdiction on this Court, see:

1. Appellate jurisdiction: *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed. 184, 187; *James Stewart & Co. v. Sadrakula,* 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596, 127 A.L.R. 821; *Lambert v. California,* 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 2d 228.

2. Generally as to subsidiary questions involving constitutional issues: *Scott v. Donald,* 165 U.S. 58, 170 S.Ct. 265, 41 L.Ed. 632.

3. California Penal Code section 1524(3), by permitting a search by warrant without prior judicial determination for allegedly obscene materials, is unconstitutional in violation of Amendments I, IV and XIV to the United States Constitution. *Flack v. Municipal Court,* 66 Cal.2d 981, 59 Cal.Rptr. 872; *cf. Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649; *Lee Art Theater v. Virginia,* ___U.S. ___, 20 L.Ed.2d 1313; *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809.

4. The search warrant was void for want of probable cause and an inadequate description of the property to be seized. *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684; *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697; *Marron v. United States,* 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231; *Stanford v. Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431; *United States v. Roth,* 391 F.2d 507; *Flack v. Municipal Court, supra; Aday v. Superior Court,* 55 Cal.2d 789, 13 Cal.Rptr. 418.

5. The failure of the warrant to specify an immediate return date for an adversary proceeding or

judicial inquiry as to the obscenity of the film rendered the search warrant void. *Freedman v. Maryland, supra; Lee Art Theater v. Virginia, supra; A Quantity of Books v. Kansas, supra.*

6. The arrest of appellant for conspiracy was a subterfuge to avoid the necessity of obtaining a warrant. *People v. Edgar*, 60 Cal.2d 171, 32 Cal.Rptr. 48; *People v. Samuels*, 250 Cal.App.2d 501, 58 Cal.Rptr. 439; *People v. Lauria*, 251 Cal.App.2d 471, 59 Cal.Rptr. 628; *People v. Samarjian*, 240 Cal.App.2d 13, 49 Cal.Rptr. 180; *Pinell v. Superior Court*, 232 Cal.App.2d 284, 42 Cal.Rptr. 676.

7. The arrest of appellant was illegal in that appellant did not commit a misdemeanor in the presence of the police officers. Penal Code section 856.1.

8. The search of appellant's home for alleged "obscene materials" in the absence of a search warrant and in the absence of a legitimate emergency was improper. *Flack v. Municipal Court, supra; Marcus v. Property Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127.

9. The requirement of a prior adversary proceeding: *Cotting v. Goddard*, 183 U.S. 79, 22 S.Ct. 30, 46 L.Ed. 92; *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; *United Public Works v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *Oklahoma Operating Company v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596; *A Quantity of Books v. Kansas, supra; Freedman v. Maryland, supra; Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469; *Marcus v. Property Search Warrants, supra; N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 1328, 9 L.Ed.2d 405; *Mills v. Alabama,*

384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484; *Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 222.

10. Prior restraint: *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; *Marcus v. Property Search Warrants, supra; A Quantity of Books v. Kansas, supra; Bantam Books v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584; *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498.

(v) California Penal Code section 1524(3) is found in Stats. 1957, c. 1884, p. 3289, section 1, and reads as follows:

"A search warrant may be issued upon any of the following grounds:

"1. When the property was stolen or embezzled.

"2. When the property or things were used as the means of committing a felony.

"3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered.

"4. When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

"The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

(c) The questions presented on appeal are as follows:

(i) Whether California Penal Code section 1524(3) is unconstitutional in violation of Amendments I, IV, and XIV to the United States Constitution, in that said statute permits a search for and seizure of allegedly obscene material, by warrant, without prior judicial determination that the material is "protected"?

(ii) Whether the search warrant that was issued for the search of Mr. Ruben's home and car was void for want of probable cause and an inadequate description of the property to be seized?

(iii) Assuming *arguendo* that the search warrant was valid, nevertheless did the failure of the warrant to specify an immediate return date for an adversary proceeding or judicial inquiry as to the obscenity of the films render the search warrant void?

(iv) Whether the arrest of appellant for conspiracy was really a subterfuge to avoid the necessity of obtaining a warrant?

(v) Whether the arrest of appellant was illegal in that appellant did not commit a misdemeanor in the presence of the police officers?

(vi) Assuming that the arrest of appellant was proper, nevertheless did the search of appellant's home for alleged "obscene materials" in the absence of a search warrant render the search improper and illegal?

(d) **Statement of the case.**

Police Officer Hickman overheard a conversation in a restaurant on Santa Monica Boulevard that a Mr. Ruben had possession of 1,000 reels of obscene film. Based upon this

allegation, *inter alia*, Los Angeles Municipal Court Judge Thomas Griffith issued a search warrant authorizing the night search of Mr. Ruben's home and car. Police Officer Baldanasso, who was tailing Ruben while the warrant was being issued, observed Ruben leave appellant's home and receive from appellant two brown paper bags. The bags were placed in the back seat of Ruben's car. Ruben was then observed to stop at a market at Highland and Franklin Streets in Los Angeles, California, and place another brown paper bag in the front area of his vehicle. Mr. Ruben was later stopped and was found to have the allegedly obscene material in two brown paper bags in the back seat of his car.

The police officers then proceeded to appellant's home and arrested him, without a warrant, on the charge of conspiracy to commit a violation of Penal Code section 311.2. A search–purportedly incidental to the arrest–was conducted and numerous films were seized from appellant, which films were believed by the officers to be obscene. However, some of the films were returned to appellant at a later time for the reason that the police officers believed them not to be obscene. After the district attorney's office refused to file the felony conspiracy charge, the Los Angeles City Attorney's office issued a two-count complaint alleging violations of Penal Code section 311.2 (possession of obscene material for sale). No judge, prior to the issuance of the complaint, ever observed the films.

The issues herein presented were first raised in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in a motion brought pursuant to the provisions of California Penal Code section 1538.5. The purpose of the motion was to suppress and return evidence.

The motion to suppress and to return evidence was denied. Thereafter, an appeal was taken from the order denying said motion to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, and the said issues were raised in Appellant's Opening Brief. The Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirmed the order denying the motion to suppress and to return evidence and denied a Petition for Rehearing and a Petition for Certification to the Court of Appeal. The identical issues were also raised in the Petition for Writ of Habeas Corpus filed in the Supreme Court of the State of California. The Petition for Writ of Habeas Corpus was denied.

(e) The federal questions presented in this appeal are substantial, in that if California Penal Code section 1524(3) is upheld against the claim of unconstitutionality, it will be possible for police officers to obtain a search warrant to seize allegedly obscene material without there first being a judicial determination as to the obscenity or non-obscenity of the material. Such a procedure would be in violation of rules previously enunciated by this Court. *Freedman v. Maryland, supra; Lee Art Theater v. Virginia, supra; A Quantity of Books v. Kansas, supra.*

(f) Appended hereto are the following:

Memorandum Opinion and Judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirming the order made by the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, denying appellant's

Motion to Suppress and Return Evidence. . . Appendix "A";

Order Denying Rehearing and Denying Certification (Appellate Department of the Superior Court of the State of California for the County of Los Angeles) . . . Appendix "B";

Order denying Petition for Writ of Habeas Corpus (Supreme Court of the State of California) . . . Appendix "C."

Respectfully submitted,

BURTON MARKS

Attorney for Defendant and Appellant.

APPENDIX "A" THROUGH "C"

Appendix "A" – Memorandum Opinion and Judgment
Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Appendix "B" – Order Denying Rehearing and Denying Certification
Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Appendix "C" – Denial of Petition For Writ Of Habeas Corpus
Clerk's Office, Supreme Court of the State of California, San Francisco, California.

APPENDIX "A"

MEMORANDUM OPINION AND JUDGMENT
OF THE
APPELLATE DEPARTMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 8007.
Trial Court No. 286156.
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSEPH EMMET GROSS, Defendant and Appellant.

Appeal by defendant from order denying motion to suppress and return evidence. Municipal Court of the Los Angeles Judicial District, Dan Kaufmann, Judge. Affirmed.

For Appellant - Burton Marks, Esq.
For Respondent - Roger Arnebergh, City Attorney, Kenneth L. Nelson, Deputy City Attorney.

The opinion of the Honorable Dan Kaufman, Judge of the Municipal Court, dated February 23, 1968, correctly and adequately disposes of all issues raised on this appeal. We adopt that opinion as the opinion of this court. (*Flack v. Municipal Court* is now in the permanent volumes and is cited as 66 Cal.2d 981.)

Judge Kaufmann's opinion is as follows:

"1. The search warrant issued for the house and car of Robert Ruben was valid under the *Flack* decision.

66 A C 1035 (*Flack v. Municipal Court*)

Flack holds that the determination of obscenity cannot be made by police officers and that the determination must be made by a judge.

"2. Here the affidavit for the search warrant described with particularity the nature of the materials for which the search was to be made. There can be no question that the issuing magistrate had sufficient and detailed information which would indicate that the material involved was hard core pornography.

"3. The officers had a legal right to arrest defendant Gross.

"An arresting officer saw the transaction between Gross and Ruben, although at the time he could not determine the nature of the material which was passed. In view of all the information available to the officers, they had reasonable probable cause to believe either that there was an unlawful conspiracy between Ruben and Gross to distribute pornographic material or that a distribution had, in fact, taken place by Gross in the presence of one of the officers. In the former case, there was reasonable cause to believe that a felony was being committed and, therefore, the subsequent arrest of Gross was proper; in the latter instance, there was reasonable and probable cause to believe a misdemeanor was being committed in the presence of the police officer and, therefore, reasonable and probable cause for Mr. Gross's arrest. While it is true that there was a delay in effecting the arrest, and while it is true that misdemeanor arrests must be made immediately under the general rule, the Court finds a time lag in the

instant case was not unreasonable.

See *Roynan v. Batten*, 55 C.A.2d 861, 867

The officers did not go about other matters unconnected with the arrest but instead carried out the service of the search warrant which established that the material in the car was, in fact, the type of material specified in the affidavits for the search warrant. Once having ascertained that this was so, they now knew for the first time that in all probability at least a misdemeanor had been committed in the presence of the one observing officer to the transaction between Mr. Gross and Mr. Ruben, and the officers then proceeded immediately to effect the arrest of Mr. Gross.

The search incident to Mr. Gross's arrest was proper.

"In view of all the circumstances then known to the officers and in view of the doctrine of legitimate emergency set forth in the *Flack* case at 66 A.C., page 1045, [page 991, 66 Cal.2d], and considering that a judge had already passed upon the nature of the specified type of material for which the officers were looking, the officers had the right to make a search incident to the arrest and to seize that type of material.

"Therefore, the defendant's motion to suppress the evidence as to the defendant Gross is denied."

The order denying motion to suppress and return evidence is affirmed.

VASEY,

Judge

Dated JUL 31 1968

We concur:

WHYTE,
Presiding Judge

WONG,
Judge

APPENDIX "B"

ORDER DENYING REHEARING AND DENYING CERTIFICATION

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Superior Court No. CR A 8007.

Trial Court No. 286156.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSEPH EMMET GROSS, Defendant and Appellant.

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

Dated AUG 13 1968

BY THE COURT.

WHYTE,
Presiding Judge

VASEY,
Judge

WONG,
Judge

APPENDIX "C"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 13 1968

Dear Sir: *I have this day filed Order*

PETITION FOR WRIT OF HABEAS CORPUS DENIED

In re: Crim *No.* 12769

Gross

on

Petition For Writ Of Habeas Corpus

Respectfully,
WILLIAM I. SULLIVAN
Clerk

23389-877 7-68 3M OSP

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on FEBRUARY , 1969, I served the within JURISDICTIONAL STATEMENT (JOSEPH EMMET GROSS – Application for Writ of Habeas Corpus) on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

COUNTY CLERK, COUNTY OF LOS ANGELES
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012
FOR: APPELLATE DEPARTMENT OF THE SUPERIOR COURT
FOR THE COUNTY OF LOS ANGELES

ATTORNEY GENERAL, STATE OF CALIFORNIA
600 STATE BUILDING
LOS ANGELES, CALIFORNIA 90012

DISTRICT ATTORNEY, COUNTY OF LOS ANGELES
600 HALL OF JUSTICE
LOS ANGELES, CALIFORNIA 90012

CITY ATTORNEY, CITY OF LOS ANGELES
200 NORTH SPRING STREET, RM. 2100
LOS ANGELES, CALIFORNIA

I swear under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY , 1969, at Los Angeles, California.

_____
D. A. Standefer

Orig. + 40 copies to: Clerk, United States Supreme Court
1 First Street, N.E., Washington, D. C.

Subscribed and sworn to before me
this day of February, 1969.

_____
Notary Public in and for the
State of California.

SUPREME COURT, U. S.
FILED
MAR 7 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968
No. 1035

Application on Behalf of

JOSEPH EMMET GROSS,

For Writ of Habeas Corpus.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

ROGER ARNEBERGH,
City Attorney,
DONALD W. MOWAT,
Assistant City Attorney,
PHILIP E. GREY,
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IN THE

Supreme Court of the United States

October Term, 1968
No. 1035

Application on Behalf of

JOSEPH EMMET GROSS,
For Writ of Habeas Corpus.

PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered July 31, 1968, be affirmed and/or that the appeal taken therefrom to this Court, be dismissed on the ground that the said judgment appealed from rests upon an adequate non-federal basis.

Statement.

This is a direct appeal from a judgment entered July 31, 1969, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellant was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District with two counts of having violated Penal Code Section 311.2. It was alleged that on June 16, 1967, the appellant "did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute, obscene matter, to wit: Obscene Film."

On December 11, 1967, the appellant pursuant to California Penal Code Section 1538.5 made a motion to suppress the evidence. By memorandum opinion the court denied the motion on February 23, 1968.

An appeal of the denial of the motion was taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matters were submitted and thereafter on July 31, 1968, the order denying the motion was affirmed with a written unpublished opinion (Jurisdictional Statement, Appendix "A"). A petition for Rehearing or Certification to the Court of

Appeal was denied on August 13, 1968 (Jurisdictional Statement, Appendix "B'). On November 4, 1968, the appellant filed a Notice of Appeal to the United States Supreme Court in the Appellate Department of the Los Angeles Superior Court.[1]

On or about October 11, 1968, the appellant filed a petition for writ of habeas corpus in the California Supreme Court. The petition was denied without a hearing on November 13, 1968 (*Gross on Habeas Corpus,* 69 A.C. No. 16, Min. p. 4).

[1]This was the judgment of the highest court of the State in this proceeding since certification to the Court of Appeal was denied. (*Schmerber v. California,* (1966) 384 U.S. 757, 16 L. Ed. 2d 908).

ARGUMENT.

I.

The Appeal Was Not Docketed in Compliance With the Rules of This Court.

> Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case. . . .
>
> Rule 13 of Rules of United States Supreme Court.

The judgment of the Appellate Department was entered on July 31, 1968. The Petition for Rehearing or Certification was denied on August 13, 1968. Though the appellant did file the Notice of Appeal in the Appellate Department within ninety days on November 4, 1968, his case was not "docketed" in this Court until February 11, 1969. Therefore the case was not timely docketed.

Though the appellant believed "that the better remedy would be to proceed by way of habeas corpus to the California Supreme Court", this collateral attack on the Appellate Department's judgment does not justify the appellant's violation of Rule 13 of this Court.

II.

Probable Cause Existed for Issuance of the Search Warrant.

Sgt. Anthony Baldassano of the Los Angeles Police Department was conducting an investigation on June 15, 1967. Robert A. Rubin was under observation by Sgt. Baldassano and at approximately 9:00 P.M. on that date, Sgt. Baldassano observed Rubin drive to 6410 Colgate Avenue, in the City of Los Angeles.

This is the address of the home of appellant [R. T. pp. 61, 62].

Rubin was observed to enter the home and stay approximately one hour [R. T. p. 66]. Sgt. Baldassano observed both Rubin and appellant emerge from the house and go to a car [R. T. pp. 66, 67], parked near Rubin's car [R. T. p. 68]. Sgt. Baldassano observed the appellant remove two brown paper bags from his car and give them to Rubin [R. T. p. 67]. A brief conversation ensued [R. T. p. 68]. Rubin placed the bags in his car and drove off [R. T. pp. 68-70]. Sgt. Baldassano followed Rubin. Rubin was arrested at approximately 12:15 A.M. on June 16, 1967 [R. T. p. 7]. Rubin had been continuously under Sgt. Baldassano's surveillance until he was arrested [R. T. pp. 73-74].

During this time Sgt. Donald D. Shaidell of the Los Angeles Police Department was obtaining a search warrant for the search of Rubin's home and car [R. T. p. 14]. Upon issuance of this warrant which authorized a search of appellant's home and car, Sgt. Shaidell went to Rubin's home and executed the warrant [R. T. p. 15]. Several reels of 8mm. movie prints were seized from Rubin's car [R. T. pp. 18-19]. Sgt. Shaidell looked at the films.

Sgt. Shaidell then contacted Sgt. Baldassano by radio, learned of Rubin's present location [R. T. p. 17], and went to that place [R. T. p. 71]. Rubin was arrested in the vicinity of Cahuenga Boulevard and Barham Boulevard [R. T. p. 55]. A search of the car disclosed two brown paper sacks in the rear seat [R. T. p. 74]. The officers observed that the sacks contained 12 and 24 reels of 8mm movie. The twelve

movies, entitled "B-Boy", depicted acts of sexual intercourse and oral copulation [R. T. pp. 35-36]. The twenty-four movies, entitled "A-9", depicted a lone female engaged in acts of masturbation [R. T. pp. 38-40]. There were numerous copies of each film and the officers inspected several of them [R. T. pp. 37-40].

After transporting Rubin to jail the officers returned to appellant's home and at approximately 2:30 A.M., they identified themselves and placed appellant under arrest [R. T. p. 7] for conspiracy to violate Section 311.2 of the California Penal Code [R. T. pp. 58-59]. After this arrest and after receiving permission from appellant, the officers searched appellant's car and house [R. T. p. 47-48]. They found reels of 8mm. movies depicting acts of sexual intercourse and oral copulation [R. T. p. 23]. A brown paper bag containing 9 reels of film was found in the house as well as a box containing 28 reels of film in 35mm tin cans [R. T. p. 23].

A search warrant cannot be issued but upon probable cause, supported by affidavit, naming and describing the person, and particularly describing the property and the place to be searched.

California Penal Code Section 1525.

The standard or test of probable cause in a search warrant is approximately the same as that applicable to an arrest without a warrant, namely; such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused.

Galena v. Municipal Court, (1965) 237 Cal App. 2d 581, 586.

Robert A. Rubin was known to Sergeant Shaidell, the affiant, as an individual he had previously arrested on "obscenity" charges. Shaidell had participated in "obscenity" investigations involving films made at [redacted]'s residence. Rubin had been seen by other officers entering the premises of persons subsequently arrested for violation of "obscenity" statutes. Known pornography dealers have been seen at Rubin's home [Affidavit, pp. 2-4].

An anonymous phone call was received by another officer and related to Sergeant Shaidell to the effect that Rubin was in possession of 1,000 reels of 8mm movies depicting acts of sexual intercourse and oral copulation. This disclosure was supported by a conversation overheard by a fellow vice officer during the course of an obscenity investigation the day after the phone call. On the morning of the day the warrant was issued, Sergeant Shaidell observed another person known to a companion of the affiant to be a person previously arrested for violation of Penal Code Section 311.2, in the company of Rubin at his home [Affidavit, pp. 4-6].

The information from the anonymous telephone call was corroborated the next day, not by another informant, but rather by statements made by third parties, overheard by an officer investigating obscenity. In addition Rubin was well known to Sergeant Shaidell as a person involved with obscenity on several previous occasions and on the day that the search warrant was sought, Sergeant Shaidell observed a known distributor of obscenity come to Rubin's house, leave carrying a carton, and deliver the carton to another known distributor of obscenity.

Each case must be determined on its own facts. Based on the foregoing, it is submitted that there was sufficient evidence presented to the magistrate to justify the issuance of the search warrant; namely, information received from an unknown informant, coupled with substantial corroborating facts known or discovered by the affiant.

The affidavit described the property to be taken as follows: "films showing males and females engaged in acts of sexual intercourse, oral copulation, sodomy and masturbation." [Affidavit, p. 1]. These are factual descriptions, specifically limited to films showing each of these four acts or combinations thereof. These are not conclusionary assertions on the part of the affiant. The affidavit particularly describes the property to be seized in accordance with the requirements of Section 1525 of the California Penal Code. This requirement is met if the property is described with reasonable particularity (*Dunn v. Municipal Court,* (1963) 220 Cal. App. 2d 858, 868).

Appellant cites *Lee Art Theatre v. Virginia,* (1968) 20 L. Ed. 2d 1313, 1315, but this case merely holds an affidavit stating only the conclusion that the film was obscene is insufficient. Here the affidavit sets forth in detail the scenes depicted. In *Flack v. Municipal Court,* (1967) 66 Cal. 2d 981, no search warrant was involved. But in *Aday v. Superior Court,* (1961) 55 Cal. 2d 789, seizure of books under a search warrant based on an affidavit to which a copy of the book was

attached was upheld. It was there held that Penal Code Sections 1539 and 1540 afford sufficient and prompt methods of securing an adversary judicial review. In *Aday v. Municipal Court,* (1962) 210 Cal. App. 2d 229, seizure under search warrant issued on affidavit describing the alleged obscene material was approved again affirming the adequacy of Penal Code Sections 1539 and 1540 as satisfying the requirements of this Court in *Marcus v. Property Search Warrant,* (1961) 367 U.S. 717 (See also: *Holden v. Arnebergh,* (1968) 265 A.C.A. 103).

California Penal Code Section 1538.5 specifically authorizes a motion to return property brought on the ground the property is protected by the free speech and press provisions of the federal and state constitutions.

Appellee contends that no prior adversary proceeding was required prior to execution of the search warrant. The procedure that was followed in the instant case prior to any search or seizure assures free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field. It was the magistrate who determined whether the material described in the affidavit was obscene. The magistrate authorized seizure of the film. This judicial determination was not a violation of the First Amendment. The Search Warrant Statutes of California are constitutional.

III.

The Arresting Officer Had Probable Cause to Believe That a Felony Had Been Committed.

The officer testified that he arrested appellant for conspiracy to violate section 311.2 of the California Penal Code—a felony.

A criminal conspiracy is an agreement or criminal partnership, the design and object of which is to do an unlawful act or a series of unlawful acts accompanied by an overt act to effect the object of such agreement *(People v. Munoz,* (1961) 198 Cal. App. 2d 649, 655).

The agreement may be inferred from the acts and conduct of the defendants in mutually carrying out a common purpose in violation of the statute *(People v. Scott,* (1964) 224 Cal. App. 2d 146, 151).

Here appellant was seen removing two bags from a car and handing them to another arrestee. This conduct occurred after the two had spent approximately an hour together in appellant's house. Within a short time thereafter the bags were found to contain films portraying sexual acts. Clearly the necessary elements of conduct inferring an agreement and an act in furtherance thereof were observed by the arresting officer.

The test of probable cause to make an arrest is whether or not a state of facts is known to the officer that would lead a man of ordinary care and prudence to believe, or to entertain a strong suspicion, that a person arrested is guilty (*People v. Perez,* (1968) 259 A.C.A. 391, 399). In determining whether there was

reasonable cause for the arrest the officers are justified in taking into account the past conduct, character and reputation of the person suspected (*Farnsworth v. Cote,* (1962) 199 Cal. App. 2d 762, 768). The state of facts here is clearly sufficient to constitute probable cause that a felony had been committed. A police officer may arrest a person without a warrant whenever he has reasonable cause to believe that the person has committed a felony (*People v. Hines,* (1968) 260 A.C.A. 13, 16).

IV.

There Was Probable Cause That a Misdemeanor Had Been Committed in the Presence of the Arresting Officers.

California Penal Code Section 311.2 prohibits, among other things, the distribution of obscene material. Section 311 defines "distribute" as the transfer of possession, whether with or without consideration.

Here one of the arresting officers saw appellant remove the two bags from his car and hand them to Rubin. Within a short time, found by the court below to not be unreasonable, (Memorandum Opinion) the officers determined that the bags contained films depicting sexual conduct. They then knew that a misdemeanor had been committed in their presence and they immediately proceeded to arrest appellant. There was, therefore, no unreasonable delay prior to the arrest of appellant (*Roynan v. Batten,* (1942) 55 Cal. App. 2d 861, 866).

V.

The Search for and Seizure of Evidence From Appellant Without a Warrant Was Lawful.

The search of appellant's house and car were pursuant to a lawful arrest of him at that location. Appellant consented to the search [R. T. pp. 47 to 48]. In addition there was a high probability that appellant would learn of Rubin's arrest and hide or destroy the films. The officers responding to the emergent nature of the situation lost no time in effecting appellant's arrest and the search pursuant thereto.

Appellant cites *Flack v. Municipal Court,* (1967) 66 Cal. 2d 981, in support of the proposition that a search pursuant to a lawful arrest without a warrant in an obscenity case, is unconstitutional. *Flack* does place limitations on such searches, however, it excepts from these limitations the legitimate emergency situation (*Flack v. Municipal Court, supra* at p. 991). Such an emergency situation existed here. In addition *Flack* is not controlling because the search was consented to. Appellant also asserts that a search without a warrant is limited to felony cases. The classic justifications for the doctrine of search incident to an arrest is the need to discover hidden weapons and the need to prevent destruction of evidence by the defendant (*People v. Webb,* (1967) 66 Cal. 2d 107, 118). The need to prevent the destruction of evidence, *i.e.,* the films, is precisely the justification for the search here. No limitation is imposed restricting it to felonies, though the arrest here was made for a felony anyway.

Conclusion.

The appeal does not disclose that there has been a violation of appellant's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with the applicable decisions of this Court, or decided a federal question of substance not theretofore determined by this Court.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this Court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

IN MATTER OF JOSEPH EMMET GROSS.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1035. Decided March 24, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.